TIAN YAN ONN DEVELOPMENT SDN. BHD. v. NATIONAL HOLDINGS LTD. & ORS.

[O.C.J. (Eusoff Chin J.) September 18, 1986]

[Muar – Civil Suit No. 166 of 1983]

Civil Procedure – Judgment by default – Application to set aside – Delay in application – Unreasonable delay – Wilful concealment of facts fatal to application – Whether defence on merits exists – Whether amount claimed is liquidated damages.

The plaintiffs claimed against the three defendants for a sum of $1,114,361.85 under the two agreements they had entered with the defendants for costs of infrastructure works done on a housing project. The plaintiffs also claimed a further sum of $23,497.80 from the first and second defendants, being the amount of quit rents and penalties for late payments. Because no defence was filed by the second defendant and no appearance was entered by the third defendant, the plaintiffs obtained judgments by default against them. The defendants now apply to the court to set aside the judgments by default. The second defendants contended that (a) they were the agents of the first defendants and therefore had a good defence (b) the amount claimed was not a liquidated sum.

Held, dismissing the applications to set aside: (1) the application to set aside a default judgment must be made promptly although no time limit is fixed. What is reasonable time within which such an application is to be filed depends on the circumstances of each case;

(2) in this case, it was totally unreasonable and inexcusable for the defendants to wait for such a long time (7 months 12 days) to file their application to set aside the default judgment, and that too, after the plaintiffs had obtained the garnishee order against their money at the bank;

(3) the non-disclosure of the agreement entered into between the first defendants and the second defendants which revealed that the second defendants were principals and not agents of the first defendants was wilful concealments of facts on the part of the second defendants and was fatal to their application to set aside the default judgment.

(4) the second defendants' contention that they had a good defence because they were agents of the first defendants was dispelled by that agreement;

(5) the defendants did not specifically dispute the amounts claimed by the plaintiffs although the plaintiffs' writ of summons was specially indorsed with a claim for a specific sum of money. As such, the amounts claimed by the plaintiffs were to be treated as liquidated damages;

(6) the default judgments against both the second and third defendants had been regularly obtained by the plaintiffs.

[*Editorial Note:* The defendants appealed to the Supreme Court *vide* Supreme Court Civil Appeal No. 181/1986. The appeal was dismissed with costs by the Supreme Court (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) on January 21, 1988.]

Cases referred to:

(1) *Ching Yuen Tung* v. *B.E.P. Akitek* [1978] 1 M.L.J. 211.

(2) *Bank Bumiputra Malaysia Bhd.* v. *Majlis Amanah Ra'ayat* [1979] 1 M.L.J. 23.

(3) *Runnacles* v. *Mesquita* (1876) 1 Q.B.D. 416.

APPLICATIONS.

Wilfred Abraham for the applicants/defendants.

G.S. Nijar (*Chua Jui Leng* with him) for the respondents/plaintiffs.

Cur. Adv. Vult.

Eusoff Chin J.: The plaintiffs' claim against the three defendants is for a sum of $1,114,361.85 under two agreements they had entered with the defendants for costs of infrastructure works done on a housing development project. They claimed a further sum of $23,497.80 from the first and second defendants as the amount the plaintiffs had to pay to the Land Office as arrears of quit rents and the penalties for late payments. This also arose out of the same agreements dated October 17, 1978 and October 26, 1978 which were exhibited to the affidavit of the plaintiffs affirmed on June 23, 1984.

The plaintiffs filed their writ of summons on June 16, 1983 and specially indorsed the amounts claimed on the writ. On June 29, 1983, the writ was served on the second defendants. On July 5, 1983 the second defendants entered an appearance through their solicitors M/s. Tahir and Salleh. No defence was filed by the second defendants.

On September 29, 1983 the plaintiffs' solicitors gave 48 hours' notice to the second defendants' solicitors to file a defence for the second defendants failing which judgment by default of defence would be entered against the second defendants. Two weeks later on October 13, 1983 no defence having been filed by the second defendants, the plaintiffs obtained a judgment by default of defence against the second defendants. This judgment had been regularly obtained by the plaintiffs.

On October 21, 1983 the judgment was served on the solicitors for the second defendants.

On November 2, 1983 M/s. Shearn Delamore filed a notice of change of solicitors for the second defendants.

On November 5, 1983 M/s. Shearn Delamore wrote to the solicitors of the plaintiffs to the

effect that they were going to apply to the court to set aside the judgment by default and requested the plaintiffs' solicitors to stay all execution proceedings for one week as per their letter of request, at "exhibit TY03" to the affidavit of the plaintiffs affirmed on June 23, 1984.

Almost four months later, the second defendants still did not file an application to set aside the judgment by default, and on February 28, 1984 the plaintiffs filed a garnishee summons against the second defendants to garnish the second defendants' money in the Overseas Chinese Banking Corporation at Muar.

On May 23, 1984 the senior assistant registrar heard the application and issued a garnishee order. On May 23, 1984 itself (*i.e.* 7 months and 12 days from the date of the default judgment, and almost 7 months after the solicitors for the second defendants had informed the plaintiffs' solicitors that they would file an application to set aside the judgment) the second defendants finally filed an application to set aside the judgment by default.

On May 26, 1984 the second defendants' solicitors filed an application to stay the execution of the garnishee order and was granted by the court. On June 24, 1984 the plaintiffs filed an application to set aside the court's order to stay the execution of the garnishee order.

As regards the third defendant, he was the guarantor to the second defendants. The writ of summons was served on him on August 25, 1983. He entered no appearance.

On September 24, 1983 judgment in default of appearance was obtained against him by the plaintiffs. On July 4, 1983 a prohibitory order against certain properties of the third defendant was obtained by the plaintiffs.

The order was served on the third defendant on July 25, 1983. On December 8, 1983 the third defendant filed an application to set aside the judgment in default of appearance.

The three applications were heard and disposed of on May 13, 1986.

Delay in filing application to set aside judgment by default

Mr. Wilfred Abraham was the second defendants' learned solicitor handling this case. He affirmed an affidavit on May 22, 1984 to say that he was not aware of the judgment in default of defence obtained against the second defendants because the previous solicitors for the second defendants did not forward to him the copy of the judgment by default of defence. Because of this he did not file the application to set aside the default judgment earlier. This is contrary to what the third defendant had to say in his affidavit. The third defendant, as a director of the second defendants, affirmed an affidavit on January 30, 1985 explaining the delay in filing the application to set aside the default judgment. He said he only came to know of the default judgment against the second defendants on November 2, 1983. This default judgment was served on the solicitors for the second defendants on October 21, 1983. It could be that the solicitors took ten days to inform the second defendants of the default judgment. But on November 2, 1983 itself the second defendants had engaged the firm of Shearn Delamore to be their solicitors, and the new solicitors had three days later, *i.e.* on November 5, 1983 written to the plaintiffs' solicitors to stay execution of the judgment for one week to enable them to file an application to set aside the default judgment. Mr. Wilfred Abraham therefore must have known of this default judgment at the latest on November 5, 1983 when that letter was written by Shearn Delamore and Co. to the plaintiffs' solicitors requesting postponement of execution of the judgment. No good and satisfactory explanations were given by the second defendants or their solicitors why they had taken almost seven months to file their application to set aside the default judgment. Because the second defendants and their solicitors had dragged their feet the plaintiffs were given the impression that the second defendants were not exercising their right in pursuing their action to set aside the judgment by default and consequently the plaintiffs applied for and obtained the garnishee order on May 23, 1984. The obtaining of the garnishee order prompted the second defendants to open their eyes to see what was going on, and no doubt prompted them to finally file their application to set aside the default judgment against them on that very day itself, *i.e.* on May 23, 1984. The application to set aside a default judgment must be made promptly although no time limit is fixed. What is reasonable time within which such an application is to be filed depends on the circumstances of each case. But for this case, I find that it was totally unreasonable and inexcusable for the defendants to wait for such a long time to file their application to set aside the default judgment, and that too, after the plaintiffs had obtained the garnishee order against their money at the bank. If the

second defendants are praying for the discretion of the court to be exercised in their favour the very least that they should demonstrate is some display of good faith. I find the second defendants' conduct was consistent with being utterly negligent or else blatantly indifferent. If the court lends its hands in aid of the second defendants now, it would be at the expense and prejudice of the plaintiffs who had taken great pains to do what needs to be done and who are not found to be at fault. As a result of this application to set aside the default judgment, the court had stayed execution of the garnishee order pending the disposal of the second defendants' application to set aside.

Non-disclosure of material facts

The learned solicitor for the second defendants affirmed an affidavit on May 22, 1984 to which he had exhibited an agreement between the first defendants and the plaintiffs (exhibit WA3 to the affidavit). This agreement was for the sale of lands. The vendors were the first defendants. The second defendants were cited as agents for the vendors, and the plaintiffs were the purchasers. The third defendant signed personally as the guarantor for the first and second defendants. The third defendant, as a director for the second defendants, signed the agreement for the second defendants, and as the second defendants were stated as agent of the first defendants, the third defendant also signed the agreement for the first defendants. This agreement also said that the vendors were responsible for the infrastructure works, *i.e.* of constructing the drains, culverts, roads, *etc.* to serve the lands sold to the plaintiffs.

Therefore, the second defendants contended that if the infrastructure works were not carried out by the vendors, and that consequently under the terms of the agreement, the plaintiffs had to do these infrastructure works, the plaintiffs should make their claim only against the first defendants, a company registered in Hong Kong. The second defendants said they were only agents of the first defendants for the sale of the land, *i.e.* to sell and collect the money for the first defendants. But both the second defendants' solicitor and the third defendant, as director of the second defendants, had failed to disclose in their affidavits the existence of another agreement entered into between the first defendants and the second defendants on July 14, 1976, and exhibited as "exhibit Q" to the affidavit of Tian Yan Onn for the plaintiffs.

This agreement ("exhibit Q") revealed that in fact the second defendants, in respect of the sale of the lands to the plaintiffs, were principals and not agents of the first defendants as the second defendants had claimed to be. By clause 4 of this agreement ("exhibit Q") the first defendants had given the second defendants the rights to sell the lands to anyone at any price provided that the second defendants must pay to the first defendants a certain fixed price per square foot of the land. Clause 3 of that same agreement ("exhibit Q") also stipulated that the second defendants had to construct the infrastructure works at a fixed contract price.

The second defendants' counsel urged me to ignore this agreement dated July 14, 1976, as it did not concern the plaintiffs. I do not agree since that agreement is very relevant to the case should the case go for trial.

I find that the non-disclosure of this agreement by the second defendants was wilful concealment of facts, and was fatal to their application to set aside the default judgment.

The claim of the second defendants that they were agents of the first defendants, which is the main issue raised by the second defendants that they had a good defence, is therefore dispelled by that agreement ("exhibit Q") dated July 14, 1976: *Ching Yuen Tung* v. *B.E.P. Akitek.*[1] I can therefore find no facts in the defendants' affidavits which would disclose a defence on the merits, or raising any triable issue – *Bank Bumiputra Malaysia Bhd.* v. *Majlis Amanah Ra'ayat.*[2]

Whether amount claimed is liquidated damages

The other issue raised by the defendants is that the amount claimed was not a liquidated sum. The affidavit affirmed by the plaintiffs on December 4, 1984 revealed that since the three defendants had failed to construct the roads, drains, culverts and water pipes (infrastructure works) in spite of various letters written by the plaintiffs to them, the plaintiffs under the terms of the agreements dated October 17, 1978 and October 16, 1978 engaged Syarikat Pembinaan Bandar to complete those works at a total cost of $1,114,361.85 under the terms of a fixed price contract signed between the plaintiffs and that Syarikat Pembinaan Bandar on October 1, 1982. There was also the quit rents which the second defendants, under the contract signed between them and the first defendants dated July 14, 1976, had to pay and which the second defendants did not pay, and were finally paid by the plaintiffs, amounting to $23,497.80. The various letters written by the plaintiffs' solici-

tors to the defendants' solicitors demanding payments of these sums of money were ignored and the assumption is that they did not want to dispute the reasonableness of the plaintiffs' claim – *Runnacles* v. *Mesquita*:[3]

The defendants in their various affidavits did not specifically dispute the amounts claimed by the plaintiffs although the plaintiffs' writ of summons was specially indorsed with a claim for a specific sum of money – *i.e.* $1,114,361.85 as against both the second and third defendants, and a further sum for $23,497.80 as against the second defendants. For that reason I would treat the amounts claimed by the plaintiffs as liquidated damages so that when I subsequently dismissed the application of the second defendants to set aside the default judgment, I did not vary the senior assistant registrar's order to one of "judgment by default of defence with damages to be assessed".

The third defendant's ground in supporting his application to set aside the default judgment was that he was not liable as a guarantor of the second defendants unless the second defendants were found liable to the plaintiffs to pay the amounts claimed.

The default judgments against both the second and the third defendants had been regularly obtained by the plaintiffs. I have found no facts disclosing any defence or raising a triable issue, and further that the long delay by the second defendants in making this application had caused prejudice to the plaintiffs. I therefore dismissed the second and the third defendants' applications to set aside the default judgments.

As regards the application of the plaintiffs to set aside the order dated May 26, 1984 to stay the execution of the garnishee order, that order of stay was to operate pending the hearing and decision of the court on the applications to set aside the default judgments by the second defendants.

Since I have dismissed the applications to set aside the default judgments made by the second and third defendants, I then allowed the plaintiffs' application to set aside the order dated May 26, 1984.

I ordered the second and third defendants to pay the costs of these applications.

Order accordingly.

Solicitors: *Shearn Delamore & Co.*; *Nijar & Nijar.*

TAN GEOK KHOON & GERARD FRANCIS ROBLESS v. PAYA TERUBONG ESTATE SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) May 11, 1987]

[Penang – Civil Suit No. 831 of 1984]

Contract – Offer and acceptance – Correspondence between the respective parties – Whether there was a contract – Remedies available.

In this case, the main issue for decision was whether there was a contract for the sale of a certain piece of land. The plaintiffs are the executors and trustees of the estate of Tan Tye Chek (the deceased) who died on May 22, 1981. This action was brought against the defendants, Paya Terubong Estate Sdn. Bhd. The plaintiffs claimed that through a series of correspondence made between the plaintiffs and defendants a contract was concluded.

Held: (1) in the present case through the crucial letters a contract was concluded;

(2) in the circumstances of the present case, nominal damages should be awarded for the plaintiff.

Cases referred to:

(1) *Gibson* v. *Manchester City Council* [1979] 1 W.L.R. 294.
(2) *Hyde* v. *Wrench* (1840) 3 Beav. 334; 49 E.R. 132.
(3) *Trollope & Colls Ltd.* v. *Atomic Power Constructions* [1962] 2 All E.R. 1035.
(4) *Van Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284, 288, 289.
(5) *Rossiter* v. *Miller* (1877-78) 3 App. Cas. 1124, 1143.
(6) *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311.
(7) *Cavallari* v. *Premier Refrigeration Co. Ltd.* (1952) 85 C.L.R. 20, 25.
(8) *Erdie* v. *Addison* (1883) 52 L.J. 80, 82.
(9) *Harichand* v. *Govind* (1923) L.R. 50 I.A. 25.
(10) *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin* [1967] 2 M.L.J. 174.
(11) *Johnson* v. *Agnew* [1980] A.C. 367.
(12) *Malhotra* v. *Choudhury* [1980] Ch. 52.
(13) *Datuk Jagindar Singh & Ors.* v. *Tara Rajaratnam* [1986] 1 M.L.J. 105.
(14) *Bonham-Carter* v. *Hyde Park Hotel* (1948) 64 T.L.R. 177.
(15) *Ashcroft* v. *Curtin* [1971] 1 W.L.R. 1731 (C.A.)
(16) *Beaumont* v. *Greathead* (1846) 2 C.B. 494, 499; 135 E.R. 1039.
(17) *The Mediana* [1900] A.C. 113.
(18) *Anglo-Cyprian Trade Agencies Ltd.* v. *Paphos Wine Industries Ltd.* [1951] 1 All E.R. 873.

CIVIL SUIT.

R. J. Manecksha for the plaintiffs.

Lim Cheng Poh for the defendants.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: Whether or not a contract has been made by a valid offer and acceptance